

1990

The State of Utah v. Frank Gene Powell : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Stephen R. McCaughey; Attorney for Appellant.

R. Paul Van Dam; Attorney General; Judith S. H. Atherton; Assistant Attorney General; Attorneys for Appellee.

Recommended Citation

Brief of Appellant, *Utah v. Powell*, No. 900202 (Utah Court of Appeals, 1990).

https://digitalcommons.law.byu.edu/byu_ca1/2589

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	Case No. 900202-CA
FRANK GENE POWELL,	:	
Defendant/Appellant.	:	Priority 2

BRIEF OF APPELLANT

Appeal of a Final Judgment from the
Fourth Judicial District Court
Utah County, State of Utah
Honorable Boyd L. Park

STEPHEN R. McCAUGHEY
Attorney for Defendant/Appellant
72 East Fourth South, Suite 330
Salt Lake City, Utah 84111
Telephone: (801) 364-6474

R. PAUL VAN DAM
Attorney General for the
State of Utah
Attorneys for Plaintiff/Respondent
236 State Capitol Building
Salt Lake City, Utah 84114
Telephone: (801) 533-5261

TABLE OF CONTENTS

	<u>Page</u>
I. JURISDICTION	1
II. NATURE OF PROCEEDINGS BELOW	1
III. ISSUES PRESENTED FOR REVIEW	1
IV. CONSTITUTIONAL AND STATUTORY PROVISIONS CONSIDERED DETERMINATIVE	2
V. STATEMENT OF THE CASE	2
VI. RELEVANT FACTS	3
VII. SUMMARY OF ARGUMENT	5
VIII. ARGUMENT	6
APPELLANT'S PLEA WAS NOT TAKEN IN STRICT COMPLIANCE WITH UTAH RULE OF CRIMINAL PROCEDURE 11 (e)	
IX. CONCLUSION	17

TABLE OF AUTHORITIES

<u>CASE</u>	<u>PAGE</u>
<u>Jolivet v. Cook</u> , 115 Ut. Adv. Rep. (Ut. Ct. App. 1989) . . .	16
<u>State v. Gibbons</u> , 740 P.2d 1309, 1312 (Utah 1987)	5, 11, 12, 13, 14
<u>State v. Valencia</u> , 112 Ut. Adv. Rep. 42 (Ut. Ct. App. 1989)	12
<u>State v. Vasilacopulos</u> , 756 P.2d 92, 94 (Ut. Ct. App. 1988)	11,13,14

STATUTES

U. C. A. §78-2 (a)-3 (2) (f)

U. C. A. §77-35-11 (e) (4)

I. JURISDICTION

This court has jurisdiction to hear the appeal in this matter pursuant to Utah Code Annotated Section 78-2(a)-3(2)(f).

II. NATURE OF PROCEEDINGS

This is an appeal from the Fourth Judicial District Court in and for Utah County, State of Utah wherein appellant entered a guilty plea to the charge of manslaughter. After sentencing, the defendant made a motion to withdraw his plea of guilty. A hearing was held before the Honorable Boyd L. Park and the motion to withdraw the guilty plea was denied.

III. ISSUES PRESENTED FOR REVIEW

1) Whether the trial court followed the procedures prescribed by the Utah Rules of Criminal Procedure, No. 11.

2) Whether the defendant's plea of guilty was in fact entered knowingly and with a full knowledge and understanding of its consequences and of the rights he was waiving.

3) Whether the trial court properly concluded that the appellant had knowingly and understandingly entered his plea of guilty.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSIDERED DETERMINATIVE

1. U. C. A. 77-35-11 (e) (4).

V. STATEMENT OF THE CASE

A. DISPOSITION IN THE LOWER COURT

Appellant Frank Gene Powell was charged with criminal homicide, murder in the second degree. Ultimately, the appellant entered a plea of guilty to an amended information charging criminal homicide, manslaughter. The appellant received an indeterminate sentence of one to

fifteen (1 to 15) years in the Utah State Prison. By motion, the appellant sought to withdraw his plea of guilty. A hearing was held before the Honorable Boyd L. Park and the motion to withdraw the guilty plea was denied.

VI. RELEVANT FACTS

On November 30, 1987, a warrant of arrest was authorized by Judge Joseph Dimick charging the appellant with criminal homicide murder in the second degree.

On December 4, 1987, the appellant appeared with his attorney before Judge Lynn W. Davis for arraignment.

A preliminary hearing was held in this matter on February 23, 1988, before Judge Lynn W. Davis. The defendant was present with his attorney. The court heard and considered the evidence of the state and entered its order binding the defendant over the Fourth Judicial District Court for arraignment. Arraignment occurred before Judge Boyd L. Park

on March 4, 1988. The defendant again appeared with counsel. He entered a not guilty plea and trial was set for May 23, 1988.

The appellant next appeared before Judge Boyd L. Park on May 20, 1988, at which time he asked leave to withdraw his not guilty plea and expressed his intention to enter a guilty plea to an amended information to be filed by the state wherein he would be charged with criminal homicide, manslaughter. The court granted the appellant's request, the state filed its amended information and, pursuant to plea negotiations, the appellant entered his guilty plea to the charge of manslaughter. Present with the appellant at the time he changed his plea was his attorney, Bradley P. Rich.

On July 22, 1988, the appellant appeared before the court, with counsel, for sentencing and received an indeterminate sentence of one to fifteen (1 to 15) years in the Utah State Prison.

By motion date September 28, 1989, the appellant sought to withdraw his guilty plea on the grounds that his plea was not made knowingly and with full understanding of the various constitutional rights he would be waiving with the entry of such a plea.

The matter was heard before Judge Boyd L. Park, and after hearing the evidence, having reviewed the court file, together with transcripts, the court denied the appellant's motion to withdraw the guilty plea.

VII. SUMMARY OF ARGUMENT

Rule 11 (e) of the Utah Rules of Criminal Procedure requires the court to make certain findings before accepting a plea of guilty. The court has the duty of ascertaining that the defendant is entering his guilty plea with full knowledge and understanding of the rights he is waiving. In this case, the trial court relied on the representations of defense counsel and the affidavit of the defendant, instead of conducting its own independent inquiry to make sure the appellant had a full understanding of what his guilty plea connotated and its consequences as required by State v. Gibbons, 740 P.2d 1309 (Utah 1987).

VIII. ARGUMENT

The appellant seeks to withdraw his plea of guilty for the reason that he did not fully understand the effect of his plea and the various constitutional and statutory rights he was waiving.

It is clear from a reading of the transcript of the appellants guilty plea and the hearing on his motion to withdraw his plea, that he was unable to read the English language above a second grade level and did not attempt to read the affidavit submitted to the Court in connection with his guilty plea.

At the hearing in connection with his plea of guilty, the following relevant discussion took place:

Mr. Rich: "He has gone through the 9th grade . . . as a practical matter he reads at a second or third grade level because of that I have been over him every paragraph of this and [sic] feels that he understands it. He does not feel comfortable reading such a document, but I have read it to him." [T-4]

The Court: "You have been over this statement with your attorney in some detail and you understand that you are waiving certain constitutional rights when you plead guilty."

Defendant: "Yes."

The Court: "Those constitutional rights have been fully explained to you by Mr. Rich?"

Defendant: "Yes."

The Court: "You have initialed each of those appropriate paragraphs?"

Defendant: "Yes."

The Court: "And you are willing at this time to acknowledge that those paragraphs are true and accurate?"

Defendant: "Yes."

The Court then received the following statement from the Deputy County Attorney of the factual basis for the charge:

Ms. Ragan: "Yes Your Honor on this date November 29, 1987, the defendant and the victim were both at a party

along with a number of other persons. During the course of the night the defendant and the victim both were there and there was some drinking going on and some conflict between the two individuals, some fighting, verbal fighting and that sort of thing. They went out to the parking lot at one point and the defendant entered his vehicle. The victim was standing in the parking lot. He circles the parking lot and came around and struck the victim. The medical examiner determined that the cause of death was that blow from the truck."

The Court: "Have you heard a statement of the facts as recited by the County Attorney Mr. Powell, is that a true and accurate statement?"

Defendant: "Yes."

The Court: "If it is your intent to plead guilty you may sign that statement."

(WHEREUPON, the defendant signs the statement.)

After a statement by the Court on the acceptability of the plea bargain, the Court made the following finding prior to accepting the guilty plea from the defendant to manslaughter.

The Court: "Yes thank you. The record may show that the court has received a statement of the defendant before pleading guilty. That he has appropriately initialed each of the paragraphs. This statement has been signed by those parties required to sign the same. The court will affix its signature.

The court has further received an affidavit of counsel signed by Mr. Rich in this matter. The court will order those documents to be made a part of the file.

The above statement by the court, along with the affidavit of the defendant are the sum total of the record relevant to compliance with Rule 11 (e) of the Utah Code of Criminal Procedure.

Rule 11 (e) (Utah Code Ann. §77-35-11 (e) (1987)) in relevant part, provides:

The Court may refuse to accept a plea of guilty . . . and shall not accept such a plea until the court has made the findings:

- (1) That the plea is voluntarily made;
- (2) That the defendant knows he has rights against compulsory self-incrimination, to a jury trial and to confront and cross-examine in open court the witnesses against him, and that by entering the plea he waives all those rights;
- (3) That the defendant understands the nature and elements of the offense to which he is entering the plea; that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all those elements;
- (4) That the defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences; and
- (5) Whether the tender plea is a result of a prior plea discussion and plea agreement and if so, what agreement has been reached

"Rule 11 (e) squarely places on trial courts the burden of ensuring that constitutional and Rule 11 (e) requirements are complied with when a guilty plea is entered." State v. Gibbons, 740 P.2d 1309, 1312 (Utah 1987). In Gibbons, the Utah Supreme Court clarified the law concerning the taking of guilty pleas in all trial courts in Utah and established a strict Rule 11 (e) compliance test in the acceptance of guilty pleas. Id. Under Gibbons, trial courts may no longer rely on defense counsel's advice or executed affidavits to satisfy the specific requirements of Rule 11 (e) but rather, "with or without an affidavit or defense counsel's advice, the trial court must conduct on-the-record review with defendant of the Rule 11 (e) requirements." State v. Vasilacopulos, 756 P.2d 92, 94 (Utah Ct. App. 1988).

Gibbons requires the trial court to conduct its own independent, formal inquiry to "make sure that the defendant has a full understanding of what the plea connotes and of its consequences." Gibbons, 740 P.2d at 1312.

The Gibbons court noted:

"Some trial courts attempt to satisfy the requirements for taking a guilty plea by using a written affidavit. However, the affidavits are not uniform throughout Utah, and trial judges often rely on defense attorneys to inform their clients of the contents of the affidavit . . . because of the importance of compliance with Rule 11 (e), . . . the law places the burden of establishing compliance with those requirements on the trial judge. It is not sufficient to assume that defense attorneys make sure that their clients fully understand the contents of the affidavit." Id. at 1313.

In State v. Valencia, 112 Utah Adv. Rep. 42 (Utah Ct. App. 1989), the Utah Court of Appeals observed the following:

"When an affidavit is used to evidence defendant's knowledge and willingness to plead guilty, the trial court's examination of defendant regarding the affidavit's contents should be sufficiently detailed and extensive to provide a factual basis to conclude from defendant's responses that his decision was knowing and voluntary. His understanding of the elements of the charges and the relationship of the law and the facts may not be presumed from a silent or incomplete examination. (Citations omitted). Id. at 44.

In Gibbons, the Utah Supreme Court did not suggest that a written affidavit or plea form be used in every case. But, if such an affidavit or form is signed by the accused and used as part of the guilty plea to evidence his or her understanding of the charged offense and the

waiver of certain rights, that statement cannot serve as a mere substitute for the full and complete examination on the record by the trial court that is required by the rule. Gibbons, 740 P.2d at 1312-14.

"The use of a sufficient affidavit can promote efficiency, but an affidavit should be only the starting point, not an end point in the pleading process . . . the trial judge should then review the affidavit with the defendant, question the defendant concerning his understanding of it and fulfill the other requirements imposed by §77-35-11 on the record before accepting the guilty plea." Id. at 1313-14.

The Court also observed that:

"The procedure may take additional time, but constitutional rights may not be sacrificed in the name of judicial economy." Id. at 1314.

In State v. Vasilacopulos, 756 P.2d 92 (1988), this court, after an analysis of the state of the law in Utah regarding the duty of the trial court in accepting guilty pleas, made the following observation:

" . . . trial courts may not rely on defense counsel or executed affidavits to satisfy the specific requirements of Rule 11 (e). Rather, with or without an affidavit or defense counsels advice, the trial court must conduct an on-the-record review with the defendant of the Rule 11 (e) requirements. Id. at 94

This court, in Vasilacopulos, noted that the Utah Supreme Court in State v. Gibbons, 740 P.2d 1309 (1987) had, in effect:

" . . . replaced the prior record as a whole test with a strict Rule 11 (e) compliance test in accepting a defendant's guilty plea." Id. at 94

It is appellants position that the strict compliance test is the present standard of review and is, therefore, applicable in this case. However, it is appellant's contention that the record in this case does not rise to the standard required by either test.

The record of the inquiry by the trial court of the defendant as required by Rule 11 (e) shows the following deficiencies:

(1) There was no dialogue about or finding made that the defendant knew he was waiving his rights against compulsory self-incrimination, to a jury trial and to confront and cross-examine in open court the witnesses against him, as required by Rule 11 (e) (3).

(2) There was no inquiry by the court as to what the nature and elements of the offense to which the defendant was pleading guilty and as to whether or not the defendant understood those elements.

There was not statement or finding by the trial court that the defendant knew and understood that at trial the State would have the burden of proving each of those elements beyond a reasonable doubt. There was no discussion of or finding that the defendant knew a plea of guilty was an admission of all those elements. All of the above is required by Rule 11 (e) (4).

(3) There was no discussion about or finding that the defendant knew the maximum and minimum sentence that could be imposed, as required by Rule 11 (e) (5).

(4) There was no finding that the plea was voluntarily made, as required by Rule 11 (e) (2).

An examination of the record of the defendant's plea shows that there is a complete lack of compliance by the trial court with the requirement of Rule 11 (e). It is clear from the record that the trial court relied on the defendant's attorney's explanation of the affidavit, in spite of the fact that the defendant could not and had not read the affidavit.

The lower court in ruling on the motion did not apply the strict compliance test, but erroneously applied the "record as a whole test." (See finding 6 of the courts decision.)

A review under the "record as a whole test", compels the same conclusion as the defendant urges above.

In Jolivet v. Cook, 115 Ut. Adv. Rep. 17 (1989), the Supreme Court, in a case upholding a lower courts finding by 'clear and convincing evidence', that Jolivet had knowingly and voluntarily entered his guilty plea, said:

" . . . the absence of a finding under [Rule 11] is not critical so long as the record as a whole affirmatively establishes that the defendant entered his plea with full knowledge and understanding of its consequences and of the rights he was waiving." Id. at 18. (emphasis added)


The only factual support for the courts ruling is that the defendant's attorney had gone over the affidavit with the defendant and his attorney felt that the defendant understood the contents of the affidavit. There was no findings by the trial court, nor any basis established for the findings required by Rule 11 (e), even after an examination of the "record as a whole."

In his decision denying the defendant's motion to withdraw his plea, the court basically weighed the testimony of the appellant that he did not understand the rights he was waiving by pleading guilty against the testimony of the defendant's attorney that he had read the defendant the affidavit and he felt the defendant understood the consequences of his plea. (See decision.) Such a comparison is irrelevant. The focus must be on the defendant's understanding at the time the plea was entered as shown by the findings of the court.

IX. CONCLUSION

Based on the authorities presented, appellant seeks an order of this court directing that his plea of guilty be withdrawn and have the same remanded to the court for trial.

DATED this 26 day of June, 1990.




STEPHEN R. McCAUGHEY
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief of Appellant was mailed on this 26 day of July, 1990, via first class mail, postage prepaid to:

R. PAUL VAN DAM
Attorney General for the
State of Utah
236 State Capitol Building
Salt Lake City, Utah 84114



STEPHEN R. McCAUGHEY
Attorney for Defendant/Appellant